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In The SUPREME COURT
Of The United States

PETITION
For Writ Of Certiorari

To The
UNITED STATES COURT OF APPEALS
For The First Circuit

No. 7197

Owen F. Lyons, et al.,
Petitioners

v.

John F.X. Davoren, as Secretary
of State, Massachusetts,
et al.,
Respondents

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All other petitioners adopt this Petition;
pro se:

Thomas J. Doyle
Clifford A. Truesdell
Francis J. Kenney
Vasco A. Lima
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IN THE SUPREME COURT
OF THE UNITED STATES

DECEMBER TERM, 1968

OWEN F. LYONS, et al, Petitioners,	*	PETITION for Writ of Certiorari to the United States Court of Appeals for the First Circuit.
v.	*	
JOHN F.X. DAVOREN, as Secretaryof State, Mass., et al, Respondents	*	

To the Honorable the Chief Justice
and the Associate Justices
of the Supreme Court of the
United States:

The petition of the above named petitioners for a writ of certiorari to review the decree of the U.S. Court of Appeals for the First Circuit entered October 25, 1968 dismissing for lack of jurisdiction, the petitioners' Appeal from the Memorandum of the U.S. District Court entered August 12, 1968, respectfully shows to this honorable court:

Opinions Below

The "Memorandum" of the district court, filed August 12, 1968 is appended to this petition as Appendix I.

The decree of the Court Of Appeals, issued on October 25, 1968 is appended to this petition as Appendix II. The Judgment of the court below is appended to this petition as Appendix III.

BASIS OF JURISDICTION OF
COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the court of first instance is United States Code, Title 28, Section 1343 (3) and (4), and U.S. Code, Title 28, Sec. 2201.

STATEMENT OF THE GROUNDS UPON
WHICH THE JURISDICTION OF THIS
COURT IS ENVOKED.

The grounds on which the jurisdiction of this court is envoked are the following: The action is one arising under United States Code, Title 28, Sections 1343 (3) and (4), U.S. Code Title 28, Sec. 2201, U.S. Code, Title 28, Sec. 2281 and 1391 (b).

The jurisdiction of this court is envoked under United States Code, Title 28, Sec. 1254 (1) which states:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The Constitutional provision which gives this court jurisdiction to review the case states:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

PETITION QUESTIONS THE CONSTITUTIONALITY OF THE FOLLOWING MASSACHUSETTS STATUTES.

Pages 3 and 3A of this Petition.

CHAPTER 53, Section 6.

"Nominations of candidates for any offices to be filled at a state election may be made by nomination papers, stating the facts required by section eight and signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election in the commonwealth at large or in the electoral district or division for which the officers are to be elected."

CHAPTER 53, SECTION 44.

The nomination of candidates for nomination at state primaries shall be by nomination papers or by endorsement for nomination by state convention as provided in section fifty-four.

In the case of offices to be filled by all the voters of the commonwealth, nomination papers shall, except as hereinbefore provided, be signed in the aggregate by at least ten thousand voters, not more than fifteen hundred of the total number required to be from any one county;

nomination papers in the case of a candidate for any such office who received at least twenty per cent of the vote on any ballot for nomination for such office at state convention held immediately prior to the state primary shall be signed in the aggregate by at least twenty-five hundred voters, not more than five hundred of the total number required to be from any one county.

Such papers for all other offices to be filled at a state election shall be signed by a number of voters as follows: - for representative in congress, two thousand voters; for councillor, ... County Commissioner, ..., one thousand voters; ..."

QUESTIONS PRESENTED FOR REVIEW

Whether a single judge court, having before it a Complaint which faces mootness due to approaching general elections, may avoid the issuance of a Final Order through the device of a "Memorandum" which, finding no substantial federal question raised by the complaint, rejects the prayer to convene a three judge court while maintaining its jurisdiction and preventing any further action by the plaintiffs.

Whether the court below, after declaring "we recognize both the apparent foreshadowing of the final action from the unequivocal language of the court's 'Memorandum' and the frustration of appellant as he sees the general election date drawing near", was in error in refusing to accept jurisdiction of the case.

Whether in the face of the definitive language set forth in Williams v. Rhodes, _ U.S. _, (decided October 15, 1968), defining discrimination that is invidious, it was error for the court below to decide that Massachusetts law governing independent candidates is "...that sort of 'minor difference in the application of laws to different groups' which the Supreme Court recognizes as permitted by the Equal Protection Clause."[1]

Whether Massachusetts law which requires independent candidates to file from two to fifteen times the number of nomination signatures required of political party candidates, imposes an invidious discrimination which burdens the right to vote and to associate — —

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1. See Appendix II, p. 25

without a compelling State interest to support such signature requirements.

STATEMENT OF THE CASE.

On August 5, 1968 the petitioners filed a complaint in the U.S. District Court, First Circuit, alleging that Massachusetts election laws violate rights protected by the Fourteenth Amendment of the United States Constitution and that the Complaint was filed in behalf of the undersigning plaintiffs and of all the voters of Massachusetts. The complaint was filed following receipt of a letter dated July 31, 1968 from the Secretary of State of Massachusetts, notifying plaintiff Owen F. Lyons that his name would not be placed on the ballot due to the failure to submit the number of nominating signatures required by Massachusetts General Laws, Ch. 53, Sec. 6.

On August 14, 1968 plaintiffs received the district court's "Memorandum" denying their prayer for the convening of a three judge court. After waiting several weeks for a Final Order so that it might be appealed, plaintiffs requested the defendants to file a Motion to Dismiss. This request was granted; on August 27, 1968 the motion to dismiss was filed, the defendants acting on request and before the date requiring them to Answer.

On September 6, 1968, not having received any action from the district court, plaintiffs paid their fee for the removal of the case to the Court of Appeals; plaintiffs filed their brief on September 13, 1968, the day following receipt of the Record of the Case by the court below.

The court below, acting with unusual dispatch and relaxing its Rules as to Time and Form, scheduled the case to be heard at its September Sitting and ordered the defendants to have their brief ready before the scheduled hearing. Defendants filed their brief one day before the hearing.

The essential facts of the case are contained in the Complaint and the briefs filed by the parties to the case.

ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The combined effect of the "Memorandum" of the district court and the decision of the court below is to uphold the Constitutionality of the election laws of Massachusetts with the affirmation that these laws are not in violation of the Fourteenth Amendment's guaranties of equal protection of the laws and the First Amendment's rights to freedom of association.

The above decisions and the arguments upon which they are based preclude all further court action by citizens who may wish to protest the election laws of Massachusetts.

The totality of Massachusetts laws regulating the rights of independent candidates, political party candidates, and the time required for filing nomination papers necessary to ballot status, all combine to give the Republican and Democratic parties in Massachusetts a complete monopoly over ballot choices offered in the State's general elections.

The newspaper, The Boston Globe, in its

editorial of October 17, 1968, "Fine Decision, Delightful Irony", declared:

> "The decision that Ohio-nominating statutes discriminate against independents could cut the heart out of an evil concocted by majority party hacks for their protection against effective challenge.
>
> "The Massachusetts legal requirements on filing...is not so restrictive as Ohio's... Even the Massachusetts law, however, tends to preserve what the Ohio decision calls a major party monopoly.
>
> "Early deadlines for filing, however, can doom an effective challenge and are indeed put to this purpose."

The Supreme Court has determined that a State must show a compelling interest to make constitutional substantial differences in the application of a law to different groups. In its decisions the Supreme Court has rejected as compelling State interests the reasons advanced or cited by Massachusetts Attorney General in his brief to the court below:

(a) a statutory discrimination will not be set aside "...if any state of facts reasonably may be conceived to justify it..."[2];

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2. United States Court of Appeals, No. 7197, Lyons v. Davoren, Brief for Defendants-Appellees, at 16.

(b) that reasonable exclusionary classifications are justified to produce an understandable and uncluttered ballot;[3]

(c) that the State's expense in printing a name on the ballot justifies the requirement that an independent candidate demonstrate support of a kind which is recognized in political parties;[4]

(d) that the percentage method or sliding scale method of determining the number of nominating signatures to be required of independent candidates "...assures that no independent will be victimized by a politically 'asleep' constituency."[5]

The court below rejects a "completely without merit" the claim of petitioner Lyons that the additional increment in the number of nomination signatures required of him over the political party candidate for Congress, is a violation of the Equal Protection Clause of the Fourteenth Amendment.

The court below declares:

"Not only is this not true but it appears that quite the opposite is true. Political party candidates for Congress must be victorious in a party convention or obtain 2,000 signatures in order to be placed on the primary ballot. They then must

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3. Ibid., p. 17
4. Ibid., p. 17
5. Ibid., p. 17

win the primary in order to be placed on the general election ballot",[6] a fact which the court below underscores as "...often a not inconsiderable undertaking."[7]

The reality here is that an insignificantly few incumbent Congressmen ever experience defeat in either the primaries or the general elections.

A copurighted story in the BOSTON GLOBE dealing with the 1968 elections reports results that conform substantially with the results of past congressional elections:

> "In the congressional election, of the 407 incumbents seeking reelection, only five were defeated (two of them in newly-formed districts) - a staggering show of constancy."[8]

The court below stresses as important the fact that an independent does not have the problem of winning a primary election, and needs only to "...submit an additional increment of signatures..." in order to be placed on the ballot in the general election.

> "Such a difference in treatment... is that sort of 'minor difference in the application of laws to different groups'...permitted by the Equal Protection Clause."[9]

Here the court below isolates and identifies

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6. See Appendix II, p.24.
7. Ibid., p25.
8. "AFTER THE ELECTION", by Joseph Kraft, BOSTON GLOBE, Nov. 21, 1968, p. 42.
9. See Appendix II, p.25.

"the difference in treatment" as being the "additional increment of signatures", and that this requirement constitutes a permissible "minor difference in the application of laws." Evidently a "substantial" difference in the application of the laws would not be constitutionally permissible.

The substance of the burden of nomination signatures for all congressional candidates seeking election in the party primaries is a uniform 2,000 signatures.

If Massachusetts required of independent congressional candidates the submission of a uniform 2,500 nomination signatures, then the additional 500 signatures would be a "minor" difference, the additional increment not forming the substance of the requirement set for party candidates.

For Massachusetts to require of independents seeking congressional office the submission of "additional increments" of from 2,000 to 4,000 signatures, then the difference in the application of this law is very substantial and certainly not minor.

In larger electoral districts the required additional increments in signatures for independents-- from 3,000 to 62,000 signatures-- leave the "minor difference" doctrine here without any foundation in reality.

With the exception of convention nomineees, nomination papers are central to the achievement of ballot status in Massachusetts. As to the required number of nomination signatures, Massachusetts apportions this burden according to the numerical strength of organized voting groups, the two major parties receiving the advantage even though the unorganized block of independent voters outnumbers those declaring allegiance to the major

parties.

The burden of the law as applied to organized groups representing special interests varies or ranges in difficulty from permissive to lenient.

By comparison the application of this same law to individual citizens representative of no organized special interest group ranges in difficulty from substantially greater numbers of signatures than party candidates -- to prohibitively larger numbers of signatures.

In contrast to the certainty of the court below that a political party candidate endures greater difficulty than the independent, the Secretary of State of Massachusetts asserts that the independent bears an impossible burden. In an advisory pamphlet to prospective candidates, the Secretary says:

> "Realistically looking at it, the preferable method is candidacy at the primary. Candidates who file election papers (i.e. independents - Ed.) almost never win. At the primary, there are fewer voters to reach, and if you win, you have the backing of party machinery. At the election, if you are an Independent candidate, you are up against the machines of both parties."[10]

Each additional increment of signatures required to secure a place on the ballot increases the difficulty which the candidate

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10. The Commonwealth of Massachusetts, Office of the Secretary, State House, Boston 02133, June 6, 1966, Pamphlet E30 3-10M-6-66-94 30 18.

has in making sure that such signatures are written exactly as they appear on the voting lists.

It is commonly recognized that the number of signatures usually denied certification is in direct proportion to the number of signatures officially required.

It was widely commented upon in the Boston press that in Governor George Wallace's effort to secure 61,000 nomination signatures for a place on the Massachusetts ballot, his workers would have to anticipate a 50% rejection of signatures by local registrars.

The Wallace Committee submitted more than 110,000 signatures and only 64,000 were certified. The petitioner in this case, owen F. Lyons, submitted more than 7,000 signatures but only 3600 were certified.

Once a required number of signatures is certified by local registrars, the path to ballot status is still frought with uncercainty. The warning of Massachusetts Secretary of State is instructive here:

> "Once your papers are on file, they become public records. Your opponents, if you are a threat, will finecomb the signatures.
>
> "The time honored method is to hire a handwriting expert, who will testify as to the complete validity of a signature."[11]

---

11. Supra., p. 6.

It is only realistic to note that those who certify the correctness of signatures are themselves appointees of the local political party's City and Ward Committees and are therefore unsympathtic with "independent" challenges to their party's incumbent candidates.

Even non-incumbent candidates who enter primary contests face an unfriendly scrutiny of nomination papers submitted to local registrars.

In the case of WYLIE et al., v. MILTON et al., No. 636247, Superior Court, Suffolk County, Massachusetts, David Wylie proved that Cambridge registrars erred in rejecting some signatures which were vital to his being placed on the ballot in the 1968 democratic primary.

A demurrer by the City of Cambridge to this proof was sustained by the court. The point being made here is that despite a great effort in time, money and organization expended in securing the requisite number of signatures, there remains great uncertainty of certification by local registrars from whose determination there seems to be no appeal.

In sum, beyond the question of invidious signature requirements, the path to ballot status is strewn with snares designed to blunt challenges from average citizens.

After obtaining reletively few nomination signatures and winning the primary election, the party nominee must campaign for one month more bolstered, however, by an aura of large public support.

The influence of this fact virtually assures victory over an independent challenger whose filing of large numbers of nomina-

tion signatures receives scant public notice.

The primary campaign and victory establishes through the news media the nominee's public identity and his position on issues of public concern. Because the independent enjoys none of this publicity and has but one month to contest the party nominee, the independent's chances for victory are slim indeed.

But this very fact underscores the independent's role as being one of public dissent with the policies or personalities of the major parties. The intrusion of such influence in public affairs by individual initiative has always been honored in the American Experience.

It is in the interests of such individual identity and meaning, as opposed to group influence, that the Fourteenth Amendment makes binding on the States First Amendment Freedoms.

If Massachsetts' nomination paper requirements are found to impose unreasonable burdens on the right to vote and to associate, and are therefore unconstitutional, then the only compelling interest of a State is in the administration of fair and honest elections.

If the number of nomination signatures required to achieve ballot status has no bearing on the conduct of fair and honest elections, then Massachusetts cannot justify the wide disparity in the treatment afforded independents and party candidates.

The foregoing, petitioners submit, is the meaning which the Supreme Court intends when it speaks of "minor differences in the application of the laws." Implicit in the

"minor difference" doctrine is the Supreme Court's insistence that the application of the laws to different groups who are engaged in the exercise of identical First Amendment Freedoms must be as uniform as administratively possible.

The petitioners request allowance of the writ because of continuing violations of the Fourteenth Amendment by Massachusetts election laws.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the "Memorandum" of the district court and the decree of the court below should be granted.

THE PETITIONERS

Owen F. Lyons Pro se

OWEN F. LYONS, pro se

All other petitioners adopt this petition.

APPENDIX I

THE MEMORANDUM OF THE U.S. DISTRICT COURT DISTRICT OF MASSACHUSETTS

August 12, 1968

MURRAY, D.J. The immediate judicial action sought by plaintiffs is notice to the Chief Judge to establish a three-judge court.

It is alleged in the complaint that plaintiffs are residents and voters of the City of Cambridge and the Eighth Congressional District of Massachusetts. They assert the unconstitutionality of Massachusetts General Laws, Chapter 53, Sections 6 and 44, as the latter section is most recently amended by the Acts of 1964, chapter 260, as regards "the number of nominating signatures required for the name of a candidate to be placed on the ballot in the state elections to be held in November, 1968," and they seek injunctive relief "restraining the Secretary of State of Massachusetts from enforcing the 'Three Per Cent Rule'[1] which presently prevents the name of plaintiff Owen F. Lyons from being placed on the ballot in the November, 1968 elections."

They request a three-judge court to be convened to hear and determine this action. They also pray for declaratory relief invalidating the general election laws of Massachusetts as to the requirements of the number of nominating signatures for independent

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1. Plaintiffs' convenient reference to the provisions of M.G.L., ch.53, s.6.

candidates (1) in each Congressional District, (2) for state-wide office, (3) for county-wide office in Middlesex County and (4) for "all other offices voted upon in the even years of state elections."

The Complaint as drawn presents difficulty. There are no direct, catagorical allegations that any of the plaintiffs, including plaintiff Owen F. Lyons, is a candidate for any elective office or has filed nomination papers. The claim or claims of the plaintiffs are not alleged directly and concisely but are stated argumentatively. Statistics are interwoven with allegations, and allegations of fact are vague and not specific. Much is left to inference either in the stating part of the complaint or in the prayers for relief. It is doubtful if any action ought to be taken on the complaint as drawn.

If it be assumed, however, that the results of a gratuitous pick-and-choose operation by the court might suggest that plaintiffs intended to allege that Owen F. Lyons is a candidate for the office of representative in Congress in the Eighth Congressional District, not as a member of a political party (as defined in M.G.L., ch 50, s. 1) but as a person whose name is not to be printed on a primary ballot as a candidate -- in other words, an independent -- and that he filed with the officers designated by law nomination papers signed by more than 2000 voters (the number of signers required for political party nomination by M.G.L., ch. 53, s. 44, as amended), but less than "such number of voters as will equal three per cent of the entire vote cast for governor at the preceding

biennial state election ... in the electoral district" (the number of signers required for nomination of "independents" by M.G.L., ch 53 s. 6), and that the Secretary of State of Massachusetts has notified Lyons that his name will not, because of the failure of his nomination papers to contain 4373 signatures, be printed on the ballot as candidate for representative in Congress, the plaintiffs have not stated a claim showing any of them are entitled to relief. There is no doubt

that the right to vote includes as an incident a right to participate in the nomination of candidates. There is no basis alleged for a claim by plaintiffs that the enforcement of the statutory provisions referred to will deprive them of the right to vote, or the right to participate in the nomination of candidates, or to sign nomination papers, or to write upon the ballot the name of any one whom they, or any of them, please to do.

It seems to be that the plaintiffs believe and contend an "independent candidate" may not constitutionally be required to file a greater number of nominating signatures than one seeking the nomination of a political party, and that a statutory scheme which permits that result denies to the person who assays the role of independent, and to those who advocate his election, equal protection of the law mandated by the Fourteenth Amendment. In

their complaint plaintiffs refer to the "one man, one vote" doctrine of the apportionment cases. But the right to vote, on the one hand, and the right to participate in nominating candidates, on the other, are clearly distinguishable. It has long been the view that the state has a vital and legitimate

interest in promoting the free and equal character of elections, and to that end may establish and, after doing so, may regulate procedures for nominating candidates for elective office. The differences between candidates of political parties and other candidates have for many years been recognized in the history of this country; and,

so long as the provisions are not unreasonable and do not deprive any one of the right to vote or to participate in the nominating procedures or to seek public office, legislative provisions warrantably may provide different procedures for their nomination. Merely to claim that a lesser number of nominating signatures is required of the nominees of political parties is insufficient to challenge the validity of the procedure; and since this complaint cannot be interpreted, as drawn, to make any other claim, it does not present a substantial federal question.

For all of the reasons hereinbefore set forth the prayer for convening three-judge court is hereby denied.

FRANK J. MURRAY
UNITED STATES DISTRICT COURT JUDGE

Dated August 12, 1968

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7197

OWEN F. LYONS et al.,
Plaintiffs, Appellants

v.

JOHN F.X. DAVOREN, as Secretary
of State, Massachusetts,
et al.,
Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, Chief Judge
McENTEE and COFFIN, Circuit Judges

Owen F. Lyons, pro se
Mark L. Cohen, Deputy Assistant Attorney
General, with whom Elliot L. Richardson,
Attorney General, and Daniel F. Toomey,
Legal Assistant, were on the brief,
for appellees.

October 25, 1968

Coffin, Circuit Judge. The appellant, Owen F. Lyons, aspires to be an independent candidate for Congress in the Eighth Congressional District Of Massachusetts. Appellant sought to have his name printed on the November general election ballot and pursuant to

Mass. Gen. Laws, ch.53, s. 6, he submitted a list of nomination signatures to the Secretary of State of Massachusetts. On July 31, 1968, the Secretary of State informed appellant that hehad not procured the required number of signatures, and therefore, his name would not appear on the general election ballot.[1]

Appellant filed a complaint in the district court naming the Secretary of State and the Attorney General of Massachusetts as defendants. Appellant requested the convening of a three judge court under 28 U.S.C., s. 2281 (1964), for the purpose of considering his requests that a permanent injunction be issued restraining enforcement of Mass. Gen. Laws, c. 53, s. 6; that Mass. Gen. Laws c. 53, s. 6 be declared uncontitutional as violative of the Fourteenth Amendment; and that the Secretary of State be ordered to place appellant's name on the general election ballot.

On August 12, 1968 the district court issued a "memorandum" which addressed itself to the "immediate action" being sought -- the establishment of a three judge court, held that no substantial federal question was presented, and concluded by denying "The prayer for convening the three-judge court."

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1. Under Mass. Gen. Laws, c.53, s.6 an independent candidate must obtain the number of signatures "...as will equal three per cent of the entire vote cast for governor at the preceding biennial state election...in the electoral district or division for which the officers are to be elected."

In the Eighth District (appellant's district) 4373 signatures were required and appellant obtained only 3685 signatures.

Two weeks later, on August 28, 1968, one defendant moved to dismiss the complaint as not stating a claim on which relief could be granted and on September 4, 1968 the other defendant filed a similar motion. On the latter date, neither motion having been acted upon, appellant appealed "from the Memorandum".

We first consider the threshold question of our jurisdiction to review the district court order. If the order is interlocutory, it is not reviewable in this court and appellant's only recourse is to seek a writ of mandamus in the Supreme Court, Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930). If the appeal is from a final order this court is compelled to consider three judge court issue at the outset because if a three judge court should have been impaneled, the single judge was without jurisdiction to consider the merits and the case must be remanded for a three judge court. Gong v. Kirk, 375 F.2d 728 (5th Cir. 1967). On the other hand, if the refusal to convene a three judge court was proper, the single judge had jurisdiction to render a decision on the merits and a review would be proper in this court.

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2. While the 1942 amendment to the three judge court act, and particularly 28 U.S.C. s. 2284 (5) (1964), might have cast some doubt on the validity of Ex Parte Poresky, 290 U.S. 30 (1934), it now appears to be settled that a single judge may render a final order where the three judge court claim does not present a substantial federal question. See Bailey v. Patterson 369 U.S. 31 (1962); Green v. Board of Elections of New York City, 380 F.2d 445 (2d Cir. 1967); Benoit v. Gardner, 351 F.2d 846 (1st Cir. 1965).

We stumble at the first hurdle. Not only is the "Memorandum" not a judgment "so set forth" in accord with Rule 58, Fed R. Civ. Proc., but it does not purport to be a dismissal of the action. While the district court left no doubt in anyone's mind that it did not consider the complaint to have merit, its ruling was confined to the "immediate action" requested, the convening of a three judge court. This left as a proper subject for a single judge court the request for declaratory relief, cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-5 (1963), which matter was not decided. This is, therefore, not comparable to the situation in Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n.2 (1962), where the denial of the request for a three judge court effectively operated to throw plaintiff out of court.

Appellant's remedy, rather than jumping the gun in a premature appeal from an interlocutory order, other than those specified in 28 U.S.C., s. 1291 and 1292, was to have sought a writ of mandamus in the Supreme Court, Stratton v. St. Louis S. Ry., 282 U.S. 10, or else have asked for a final judgment. We therefore must remand this case to the district court for further action. In so doing we recognize both the apparent foreshadowing of the final action from the unequivocal language of the court's "Memorandum" and the frustration of appellant as he sees the general election date drawing near. We therefore put aside our normal scruples about opining on a matter not before us and indicate our agreement with the district court on the insubstantiality of the federal question.

We believe that appellant"s claim is completely without merit. The essence of his complaint is that Mass. Gen. Laws, c.53, s.6 violates the Equal Protection clause of the Fourteenth Amendment because it imposes a heavier burden on Independent candidates than on political party candidates[3] with respect to being placed on the general election ballot. Not only is this not true but it appears that quite the opposite is true. Political party candidates for Congress must be victorious in a party convention or obtain 2,000 signatures in order to be placed on the primary ballot. They then must win the primary in order to be placed on the general election ballot.[4] Mass. Gen. Laws, c.53, s. 44. In contrast, independents, such as appellant, need only obtain the number of signatures equal to three per cent of the gubernatorial vote in their respective districts in order to be placed on the general election ballot.Mass. Gen. Laws, c 53, s. 6.

In short, a person wishing to appear as an independent candidate on the final ballot must only submit an additional increment of signatures. A person wishing to appear as a

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3. Mass Gen. Laws, c.50, s.1 defines political party as "... a party which at the preceding biennial state election polled for governor at least three per cent of the entire votes cast in the commonwealth for that office..."

4. It also seems clear that a member of a political party who fails to win the primary but nevertheless desires to be placed on the general election ballot must comply with the requirements imposed on independents. Mass. Gen Laws, c. 53, s. 48A.

political party's candidate on the final ballot must either win the convention's nomination or submit somewhat fewer signatures than the independent-aspirant and win his party's primary, often a not inconsiderable undertaking. Such a difference in treatment as that complained of in this case - the only point on which we express an opinion - is that sort of "minor difference in the application of laws to different groups" which the Supreme Court recognizes as permitted by the Equal Protection Clause, Williams v. Rhodes, - U.S. - (decided October 15, 1968).[5]

Appeal dismissed for lack of jurisdiction.

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5. This case was decided after our opinion was shown to the parties on October 10, 1968, but before it was printed.

APPENDIX III

UNITED STATES COURT OF APPEALS
For The First Circuit

No. 7197

OWEN F. LYONS ET AL.,
Plaintiffs, Appellants,

v.

JOHN F.X. DAVOREN ET AL.,
Appellees

JUDGMENT

October 25, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel for appellees and by Owen F. Lyons pro se.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The appeal herein is dismissed for lack of jurisdiction.

By the Court:

/s/ Roger A. Stinchfield
Clerk

SUPREME COURT, U. S.

JAN 8 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 824.

OWEN LYONS ET AL.,
Petitioners,
v.
JOHN F. X. DAVOREN, AS SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States.

October Term, 1968.

No. 824.

OWEN LYONS et al.,
Petitioners,
v.
JOHN F. X. DAVOREN, as Secretary of the Commonwealth of Massachusetts, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

Opinions Below.

The memorandum of the Federal District Court of Massachusetts, annexed as Appendix I at page 16 of the petition for writ of certiorari, is unreported. The opinion of the Court of Appeals for the First Circuit is printed as Appendix II at page 20 of the petition and is reported at F. 2d (1st Cir. 1968).

Jurisdiction.

The judgment of the Court of Appeals (Appendix III, at page 26 of the petition) was entered on October 25, 1968.

The petition for writ of certiorari was filed in this Court on December 9, 1968, under 28 U.S.C. § 1254(1).

Statutes.*

A. Statutes relative to the jurisdiction of the Court of Appeals:

28 U.S.C. § 1291.
28 U.S.C. § 1292.
28 U.S.C. § 2281.

B. Statutes relative to the petitioners' substantive contentions:

Massachusetts G.L. c. 53, § 6.
Massachusetts G.L. c. 53, § 44.
Massachusetts G.L. c. 53, § 48A.
Massachusetts G.L. c. 54, § 77.

Statement of the Case.

On August 5, 1968, the petitioners filed this action in the United States District Court for the District of Massachusetts. Although the complaint is, in the words of the District Court, "vague and not specific" (Memorandum, p. 17 of the Petition), it appears that the petitioners' contentions are focused on those Massachusetts statutes, G.L. c. 53, §§ 6 and 44, which govern Congressional nominations for independent and "party" candidates. The complaint contains prayers for declaratory relief and for the convening of a three-judge court.

*The text of the cited statutes may be found in the Appendix to this brief.

Although drawn loosely and without positive assertions, the complaint seems to say that the "equal protection" guarantees of the Fourteenth Amendment are denied to "independent" candidates for Congress by the Massachusetts statutes. Under those statutes a political-party candidate for Congress, in order to win a place on the ballot for the 1968 general election, was required *first* to either win his party nomination for the primary ballot at a party convention or, if he failed to win the nomination, obtain 2,000 signatures, and *second* to enter the primary election and then win it. An independent candidate for Congress from the Eighth District, on the other hand, was required to produce 4,373 signatures to attain printed status on the ballot for the 1968 general election (Petition, at page 21).

The District Court issued a "memorandum" on August 12, 1968 (Petition, p. 16), which ruled that the complaint "does not present a substantial federal question" and that "[f]or all the reasons hereinbefore set forth the prayer for convening the three-judge court is hereby denied." On August 30, 1968, the respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted. No disposition of that motion has yet been made.

An appeal from the District Court's action was filed with the Court of Appeals for the First Circuit on September 6, 1968. On October 25, 1968, the Court entered a judgment: "Appeal dismissed for lack of jurisdiction" (Petition, p. 26).

Question Presented.

Whether the Court of Appeals had jurisdiction of the appeal from the order of the Federal District Court judge refusing, for lack of a substantial federal question, to con-

vene a three-judge court to enjoin enforcement of the Massachusetts statute governing requirements for the nomination of independent Congressional candidates when the merits of the case, including the matter of declaratory relief, still remained for further consideration by the District Court judge?

Argument.

1. SINCE THE ORDER OF THE DISTRICT COURT WAS INTERLOCUTORY IN NATURE AND DEALT ONLY WITH THE CONVENING OF A THREE-JUDGE COURT, LEAVING FOR FURTHER DETERMINATION THE MERITS, INCLUDING DECLARATORY RELIEF, THE ORDER WAS NOT "FINAL," AND WAS THEREFORE NOT APPEALABLE TO THE COURT OF APPEALS.

28 U.S.C. § 1291, provides that only "final decisions" are reviewable by appeal to a Court of Appeals. The only exceptions are found in 28 U.S.C. § 1292, but they do not include a mere refusal to convene a three-judge panel under 28 U.S.C. § 2281. The exclusive remedy for such refusal lies rather in a petition to the Supreme Court for a writ of mandamus. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 16 (1930).

The memorandum of the District Court in the present case merely declined to convene a three-judge court. That the District Court judge was keenly aware that his action was only interlocutory is evident from his statement that "the immediate judicial action sought by plaintiffs is notice to the Chief Judge to establish a three-judge court;" from his ruling that the complaint "does not present a substantial federal question" (see *Ex Parte Poresky*, 290 U.S. 30); and from his conclusion that "For all the reasons hereinbefore set forth the prayer for convening the three-judge

court is hereby denied" (Petition, pp. 16-18). *Cf. Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715, note 2, wherein it was held that by the denial of the application for a three-judge court "[a]ppellant was effectively out of court" because the District Court judge indicated that he would abstain from further action in the case until state courts decided the questions in issue.

Neither the merits nor the prayer for declaratory relief was disposed of by the memorandum in the present case, each remaining for the District Court's further determination. *Stratton* v. *St. Louis Southwestern Railway Co., supra,* is therefore decisive of the case at bar. *Stratton* held that "no appeal lay to the Circuit Court of Appeals [from the refusal to convene a three-judge panel], and that court should have dismissed the appeal for want of jurisdiction." 282 U.S. at 16. The Court of Appeals in the present case strictly adhered to *Stratton's* mandate. To review the Court of Appeals' decision by a writ of certiorari now would serve no useful purpose. There is no suggestion that *Stratton* is not applicable, is not controlling authority, or that its force has in any way been diminished. We observe, moreover, that the jurisdiction of the Court of Appeals is fixed by statute. Since *Stratton* was decided in 1930, we must now certainly conclude that Congress has regarded the *Stratton* rule as embedded in the statute itself.

2. WHETHER OR NOT THE COURT OF APPEALS HAD JURISDICTION OF THE APPEAL FROM THE REFUSAL TO CONVENE A THREE-JUDGE COURT, THE MASSACHUSETTS NOMINATION REQUIREMENTS RELATIVE TO INDEPENDENT CANDIDATES FOR CONGRESS DO NOT VIOLATE "EQUAL PROTECTION" GUARANTEES.

Although the question before this Court relates exclusively to the correctness of the Court of Appeals' refusal

to take jurisdiction of the appeal, we note, in any event, that petitioners' substantive arguments are lacking in merit.

An examination of the challenged statutes reveals that they do not violate the Fourteenth Amendment's "Equal Protection" clause. As stated in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955), "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." This limitation on the Fourteenth Amendment's protective function was recognized in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), an election case, where the Court held:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. at 425-426.

The application of the foregoing test to the instant case shows strong justification for the Massachusetts classification.

Since political parties are an essential element of the American electoral process, a state may establish conditions which candidates of political parties must meet in order to gain recognition as party nominees. "Independent" candidates may also be required to meet certain conditions for ballot position. Because the latter candidates are necessarily determined by a process which is different from the process by which party candidates are named, a state may, we submit, provide different requirements for each process. And, as long as a state does not thereby deny the right to vote or impose unreasonable limitations on the right to seek public office, there is no valid reason for complaint.

In the present case the Massachusetts statutes not only do not discriminate against the independent candidate; they may actually be regarded as placing a lighter burden on him than on the party candidate. The "party" candidate, in order to enter the general election, must *first* win his party's nomination at the party convention (or, failing that, obtain 2,000 signatures) to get on the primary ballot, and *second* enter the primary and win it. If he fails at the primary and still desires to run in the general election, he must comply with the same requirements imposed on independents. G.L. c. 53, § 48A. By contrast, an independent candidate in the Eighth Congressional District is required to produce only 4,373 signatures to gain printed status on the November general ballot. (This figure is derived from the so-called "three per cent" rule of G.L. c. 53, § 6.) And any candidate may win the general election by write-ins alone. G.L. c. 54, § 77.

Having in mind the burdens placed on political-party candidates, we submit that the treatment of the independents is certainly not unfair. The November, 1968, election, moreover, is now history, and nothing in the case suggests that the facts present an issue of such vital importance as to invoke the attention of this Court. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955), for the rule that this Court will not use certiorari to examine a matter of "scholarly" or "academic" interest only.

Conclusion.

For the foregoing reasons, the respondents urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Appendix.

A. Statutes Relative to the Jurisdiction of the Court of Appeals.

28 U.S.C. § 1291. Final decisions of District Courts:

"The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." (Emphasis supplied.)

28 U.S.C. § 1292. Interlocutory decisions:

"(a) The court of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 2281. Injunction against enforcement of State statute; three-judge court required:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

B. Statutes Relative to Petitioners' Substantive Contentions.

Massachusetts G. L. c. 53, § 6. Nomination papers; number of signatures:

"Nominations of candidates for any offices to be filled at a state election may be made by nonination papers, stating

the facts required by section eight and signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election in the commonwealth at large or in the electoral district or division for which the officers are to be elected. In the case of offices to be filled by all the voters in the commonwealth, no more than one third of the required number of signatures shall be from any one county. Nominations of candidates for offices to be filled at a city or town election, except where city charters or general or special laws provide otherwise, may be made by like nomination papers, signed in the aggregate by not less than such number of voters as will equal one per cent of the entire vote cast for governor at the preceding biennial state election in the electoral district or division for which the officers are to be elected, but in no event by less than twenty voters in the case of an office to be filled at a town election; provided, however, that no more than fifty signatures of voters shall be required on nomination papers for such town office. At a first election to be held in a newly established ward, the number of signatures of voters upon a nomination paper of a candidate who is to be voted for only in such ward shall be at least fifty." (Emphasis supplied.) (As amended through St. 1960, c. 224.)

Massachusetts G.L. c. 53, § 44. Nomination papers; number of signatures:

"The nomination of candidates for nomination at state primaries shall be by nomination papers or by endorsement for nominations by state convention as provided in section fifty-four. In the case of offices to be filled by all the voters of the commonwealth, nomination papers shall, except as hereinafter provided, be signed in the aggregate by at least ten thousand voters, not more than fifteen hundred of the

total number required to be from any one county; nomination papers in the case of a candidate for any such office who received at least twenty per cent of the vote on any ballot for nomination for such office at the state convention held immediately prior to the state primary shall be signed in the aggregate by at least twenty-five hundred voters, not more than five hundred of the total number required to be from any one county. *Such papers for all other offices to be filled at a state election shall be signed by a number of voters as follows:—for representative in congress, two thousand voters;* for councillor, district attorney, clerk of courts, register of probate and insolvency, register of deeds, county commissioner, sheriff and county treasurer, one thousand voters, except that in Barnstable, Berkshire, Franklin, and Hampshire counties such papers for nomination to the office of clerk of courts, register of probate and insolvency, register of deeds, county commissioner, sheriff and county treasurer shall be signed by five hundred voters; for state senator, three hundred voters; for representative in the general court and commissioners to apportion Suffolk county, one hundred and fifty voters; provided, however, that if ten per cent of the number of voters in the respective district who are enrolled in the party whose nomination the candidate seeks is a lesser number than the aggregate required above, then such ten per cent shall be the required aggregate. The total number of such enrolled voters shall be determined from the records in the office of the state secretary. In Dukes and Nantucket counties such papers for nomination to all offices within the county to be filled at any state election shall be signed by twenty-five voters." (Emphasis supplied.) (As amended through St. 1966, c. 335, § 1.)

Massachusetts G.L. c. 53, § 48A. Nomination otherwise than by political party; independent candidates:

"If a candidate for any office to be filled at a state election is nominated otherwise than by a political party, and files for the same office at the same election a certificate of nomination or nomination papers of either of the two major political parties, said party nomination papers or certificate of nomination shall be declared invalid and of no account, except as hereinafter provided.

"Any person who is a candidate for any office to be filled at a state election shall make a choice as to whether he intends to be a candidate for nomination of a major political party or as a state election candidate, generally referred to as an independent candidate, by the withdrawal of his name as a candidate for nomination of such party or as a candidate for state election, as the case may be, in the manner provided by section thirteen. If a person files as a state election or independent candidate, and likewise files nomination papers for nomination of either of the two major parties, and fails to make such choice of withdrawal, he shall not have his name printed on the ballot to be used in the state primary as a candidate of either of the two major political parties, or printed on the ballot to be used at state elections as a state election or independent candidate unless he was nominated at the primary by having his name inserted on the ballot, either by writing or by a paster or sticker, and accepted said nomination." (Added by St. 1956, c. 232.)

Massachusetts G.L. c. 54, § 77. Marking ballots:

"The voter on receiving his ballot shall, without leaving the enclosed space, retire alone to one of the marking compartments, and shall, except in the case of voting for presi-

dential electors, and except as provided in section thirty-three E, prepare his ballot by making a cross (X) in the square at the right of the name of each candidate for whom he intends to vote *or by inserting the name and residence of such candidate in the space provided therefor and making a cross in the square at the right;* and, upon a question submitted to the vote of the people, by making a cross in the square at the right of the answer which he intends to give." (Emphasis supplied.) (As amended by St. 1967, c. 564, § 11.)